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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARITO LUCAS RODAS-LOPEZ;
ELIDA ANGELA GRAMAJO-REYES,

Petitioners,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 05-72642

Agency Nos. A95-605-013
A95-604-941

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 22, 2008**

Before: GRABER, FISHER, and BERZON, Circuit Judges.

Margarito Lucas Rodas-Lopez and his wife, natives and citizens of
Guatemala, petition for review of the Board of Immigration Appeals' ("BIA")

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

order dismissing their appeal from an immigration judge's ("IJ") decision denying their application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We have jurisdiction under 8 U.S.C. § 1252. We deny in part, grant in part, and remand the petition for review.

The record does not compel the conclusion that the untimely filing of Rodas-Lopez's asylum application should be excused due to extraordinary circumstances. *See* 8 U.S.C. § 1158(a)(2)(D); *see also* 8 C.F.R. § 208.4(a)(5). Accordingly, we deny the petition as to his asylum claim.

In his opening brief, Rodas-Lopez did not address, and therefore has waived any challenge to, the IJ's denial of CAT protection. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996).

We cannot effectively review the IJ's withholding of removal finding. The IJ did not consider whether Rodas-Lopez suffered past persecution, and therefore it is unclear whether Rodas-Lopez has a presumption of eligibility for withholding of removal. *See Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1192-94 (9th Cir. 2005); *see also* 8 C.F.R. § 1208.16(b)(1).

Accordingly, we grant the petition for review and remand this case to the BIA for further proceedings consistent with this disposition. *See id.* at 1194.

**PETITION FOR REVIEW DENIED in part; GRANTED in part;
REMANDED.**